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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 242

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Shipowners and Merchants Tugboat Company, a corporation, hereinafter referred to as "petitioner," respectfully presents its petition for issuance of a writ of certiorari to the United States Court of Appeals

for the Ninth Circuit to review a final decision made and entered by that Court on June 11, 1953 (R. 44). The opinion of the Court of Appeals has not yet appeared in the Federal Reports. The opinion of the District Court is reported in 103 F. Supp. 152, and in 1952 A.M.C. 483 (R. 18-21).

SUMMARY AND SHORT STATEMENT OF THE MATTER CONCERNED.

The case was tried below on an agreed statement of facts, presenting a single legal issue as to the measure of damages to be recovered by the United States for collision damage to a government vessel. The amount at stake is small, but the legal issue is a new one and is involved in a large number of similar claims by the United States, including several other collision claims against petitioner, all of which have been held in abeyance pending final decision in this action. The issue revolves around the effect of the War Surplus Disposal statutes and sales of surplus vessels thereunder.

The agreed facts are that a government vessel, the *Golden Gate,* was damaged in collision with petitioner's tug, *Henry J. Biddle,* by the latter's sole fault. The damage to the *Golden Gate* was surveyed and an estimate made of what it would cost to make repairs, but repairs were never made (other than a small *actual* expenditure for *temporary* repairs, liability for which is conceded and is not at issue). Before any money had ever been spent for permanent repairs, the *Golden Gate* was sold as war surplus to the Chilean Line for the full sale price specified by the disposal statute (50 U.S.C.A.,

appendix, sec. 1736) and the regulations issued thereunder.

The statute and regulations fixed a single set price at which C-2 type vessels of the age of the *Golden Gate* were to be sold, and the *Golden Gate* was sold for that full statutory price—the same price, admittedly, at which she would have been sold had there been no unrepaired damage at all. Since the treasury thus eventually received exactly the same number of dollars for the *Golden Gate* as would have been received had there never been a collision at all, petitioner contended below, and contends here, that the government sustained no actual damage or detriment whatever, and that a recovery of phantom damages based on a theoretical estimate of what unperformed repairs *might* have cost is not justified in those circumstances.

JURISDICTION.

The United States filed a libel *in personam* against petitioner on the admiralty side of the United States District Court for the Northern District of California to recover its alleged collision damage. Petitioner appeared generally, and the cause was submitted on an agreed statement of facts. The District Court had jurisdiction of this admiralty cause under 28 U.S.C.A. 1333(1).

The District Court made its decree in favor of the government on March 6, 1952 (R. 26). Petition for Appeal to the Court of Appeals for the Ninth Circuit was timely filed on May 28, 1952 (R. 27) and order allowing appeal was signed and filed that same day (R. 27). Cita-

tion on appeal was served upon the United States Attorney the same date (R. 32) and the cause was thereafter presented on the merits to the Court of Appeals, whose appellate jurisdiction existed under sections 1291 and 2107 of Title 28, U.S.C.A.

Jurisdiction of the Supreme Court of the United States rests upon 28 U.S.C.A. 1254(1). The final decree of the Court of Appeals was entered June 11, 1953 (R. 44), and this petition will be filed within the 90 days allowed by 28 U.S.C.A. 2101(c). A stay of the mandate of the Court of Appeals has been obtained.

QUESTIONS PRESENTED.

1. When, by statute and regulation, the United States fixed a single price at which surplus C-2 merchant vessels should be sold, and obtained that set price for each vessel sold, can it recover for unrepaired collision damage to one of those vessels, despite the fact that no money was spent for repairs and no money was lost in the sale because of such damage?

2. When it is shown that the shipowner has sustained no actual detriment, may the shipowner be allowed a recovery by the arbitrary application of a rule of thumb for measuring damages, even though the reasons for the rule do not exist?

3. In fixing the quantum of recovery for a maritime tort, should the court consider subsequent events which bear on the issue of damages, or must the court close its eyes to everything occurring after the tort, and consider the case solely as of the time the tort was committed?

REASONS RELIED UPON FOR ISSUANCE OF WRIT.

A writ of certiorari should issue for these reasons:

1. The case presents an important new issue of law which will be controlling in a large number of collision cases involving damage to government vessels, and it is desirable that the governing rule be established by this Honorable Court so that all such cases may be correctly and uniformly disposed of in all districts and circuits.

Many government-owned merchant vessels which were sold as surplus for the full statutory sales price had unrepaired collision damage, no outlay for repairs having been made, and no reduction in the statutory price being made because of the damage. The United States is attempting to claim damages from the owners of the private ships involved in such collisions, on the basis of surveyors' estimates as to probable repair costs. Several such claims are pending against this petitioner, relating to collisions occurring back in the war years, and the same issue is being raised in various government claims against other shipowners all over the country.

It is submitted that uniformity of treatment for these claims is desirable and important, and that such uniformity can best be obtained by a decision of this Honorable Court establishing the correct rule at the outset.

2. The decision of the Court of Appeals rejects substance for form, and renders blind obedience to a rule of thumb on damages despite the complete absence here of the considerations which gave rise to the rule. The decision thus conflicts with the prior decisions of this Honorable Court in which the basic rule has been held to be that damages should be calculated by whatever

method best measures the injured party's *actual detriment* under the particular circumstances, there being no magic universality in any particular yardstick for fixing damages. *Ill. Cent. Ry. v. Crail,* 281 U.S. 57, 74 L. Ed. 699, 50 S. Ct. 180; *Brooklyn E. Dist. Terminal v. U. S.,* 287 U.S. 170, 77 L. Ed. 240, 53 S. Ct. 103.

In the latter case demurrage was allowed on a damaged vessel during the lay-up for repairs, measured by the cost of hiring a substitute, although no substitute was actually hired. This was disapproved by this Honorable Court, which said, in part:

> "The disability of a vessel will not sustain demurrage at the rate of the value of her hire unless an award at such a rate can be seen to be *reasonable* when the disability is viewed *in the setting of the circumstances. The Conqueror,* 166 U.S. 110, 41 L.Ed. 937, 17 S. Ct. 510, *supra.* Only when thus enlightened can we choose *the yardstick most nicely adjusted to be a measure of reparation* * * *"
>
> 287 U.S. at 174, 77 L. Ed. at 242, 53 S. Ct. at 105.

3. Insofar as the decision of the Court of Appeals refuses to consider events subsequent to the tort in fixing recoverable damages, it is in conflict with decisions of this Honorable Court, of Courts of Appeals in other circuits, and of state courts. *Van Beeck v. Sabine Towing Co.,* 300 U.S. 342 at 347, 81 L. Ed. 685 at 688, 57 S. Ct. 452; *The Pocahontas,* 109 F. (2d) 929 (2nd Cir.); *The Super-X,* 15 F. Supp. 294 (S.D.N.Y.); *Sider v. Gen. Electric Co.,* 238 N.Y. 64, 143 N.E. 792; *Cooper v. Shore Elec. Co.,* 63 N.J.L. 558, 44 Atl. 633 (cited with approval by this Honorable Court in *Van Beeck, supra.*)

"It is a rule of law, without exception so far as we are aware, that any circumstance, otherwise competent in evidence to reduce the damages, may be proven on the trial for that purpose, although it may not have come into existence until after the commencement of the action." *Marsh v. McPherson,* 15 Otto (105 U.S.) 709 at 716, 26 L. Ed. 1139 at 1141.

4. The Court of Appeals has ignored the basic law laid down by this Honorable Court and by other state and federal courts in:

(a) Refusing to consider post-collision events which bore directly on the quantum of actual damage, and

(b) Rigidly applying a rule of thumb on damages to allow a recovery where the facts and circumstances show conclusively that the United States sustained no actual detriment or loss whatever.

WHEREFORE, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review that Court's decision in this case, and submits, attached hereto, its brief in support of this petition.

Dated, San Francisco, California,
August 3, 1953.

LLOYD M. TWEEDT,
Proctor for Petitioner.

STANLEY J. COOK,
DERBY, COOK, QUINBY & TWEEDT,
Of Counsel.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

LLOYD M. TWEEDT, being first duly sworn, upon his oath deposes and says:

I am proctor for petitioner in the above entitled cause. I have read and considered the foregoing petition and the attached supporting brief and am familiar with their contents. In my judgment said petition is well founded in law and fact, and I certify that the same is not interposed for delay.

LLOYD M. TWEEDT.

Subscribed and sworn to before me this 4th day of August, 1953.

(Seal) VIOLA L. [illegible] (Seal)

Notary Public in and for the City and County of San Francisco, State of California.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUBJECT INDEX.

This brief is bound in a single volume with the petition for writ of certiorari. A subject index of the brief and a table of authorities are set out immediately after the subject index for the petition, at the start of the volume, so that both indices appear at the front, one after the other.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is reported in 103 F. Supp. 152, 1952 A.M.C. 483. The opinion of the Court of Appeals has not yet appeared in official reports, but will be found at pages 42-44 of the Record.

GROUNDS OF JURISDICTION.

This case is an admiralty proceeding brought by the United States against petitioner to recover for collision damage to a ship. The admiralty jurisdiction of the District Court is based on 28 U.S.C.A. 1333 (1), the appellate jurisdiction of the Court of Appeals on sections 1291 and 2107 of Title 28, U.S.C.A.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. 1254(1). Final decree of the Court of Appeals was filed June 11, 1953, and the petition for certiorari will be filed within the ninety days thereafter which are allowed by 28 U.S.C.A. 2101(c).

STATEMENT OF THE CASE.

The case was tried upon an agreed statement of facts, accepted in the findings of the District Court, and presents solely the legal issue of whether the United States should recover for unrepaired collision damage to its ship under the particular circumstances here involved. The facts are these:

On July 12, 1945, in San Francisco Bay, petitioner's tug *Henry J. Biddle* (hereinafter called "the tug") col-

lided with the government-owned merchant vessel, *Golden Gate*. The collision was caused solely by the fault of the tug (R. 22). The collision occurred without any knowledge or privity on the part of petitioner (R. 22-3), hence petitioner was entitled to have its liability limited to the value of the tug, under the limitation of liability statute (46 U.S.C.A. 183-189, incl.). The value of the tug was $1500 (R. 23).

Thus petitioner was liable, up to the limitation ceiling of $1500, for all provable damages sustained by the United States as owner of the *Golden Gate,* and the only issue was the quantum of such damages. The stipulated facts on that issue are these:

After the collision, temporary repairs were made at a cost of $250 (R. 23). Liability for this amount was conceded by petitioner and is not in dispute. Surveyors who examined the *Golden Gate* after the collision estimated that permanent repairs would cost $5,400, which is conceded to be a reasonable *estimate* (R. 23). No such repairs were ever made by the United States, however, and *no further outlays were made by the government in connection with this collision damage* (R. 23).

Some eight months after the collision, Congress enacted a statute for sale of surplus vessels, known as the Merchant Ship Sales Act of 1946 (50 U.S.C.A., Appendix, secs. 1736-46, incl.). The provisions fixing the price for sale of surplus dry-cargo ships are contained in sec. 1736.

Subsection (d) of sec. 1736, containing four numbered subparagraphs, sets the "statutory sales price" for a dry-cargo ship at 50% of prewar domestic cost, less a

depreciation allowance of 5% per annum for the vessel's entire age and an additional allowance of 3% per annum for war service, but the price never to be less than 35% of domestic war cost.

Subsection (c) of sec. 1736 defines "prewar domestic cost" as the amount for which each type of vessel could have been built in the United States on January 1, 1941, as determined by the Maritime Commission and published in the Federal Register.

Subsection (e) of sec. 1736 defines "domestic war cost" as the amount for which each type of vessel could have been built in the United States during 1944, as determined and published by the Maritime Commission.

Pursuant to this statutory authority and direction, the Maritime Commission determined prewar and war costs of various types of vessels and published them in the Federal Register (11 F.R. 4459 et seq.). The figures for C-2 vessels (the *Golden Gate* was a C-2) will be found in 46 C.F.R. Chap. II, sec. 299.56, subsections (c), (4) and (5), as follows: Domestic prewar cost, $2,100,000; domestic war cost, $2,736.624; unadjusted sales price (50% of prewar cost), $1,050,000; floor price (35% of war cost), $957,818.

Depreciation at 5% for one year on $1,050,000 would give a price of $997,500 for a C-2 one year old with no war service. Even without the 3% additional allowance for war service, however, 10% straight depreciation for *two* years would "adjust" the price below the floor price of $957,818 (35% of war cost), and this latter figure would then prevail.

Thus the net result of statute and regulations was that the price for all C-2 vessels two years old or older was the floor price of $957,818, regardless of differences among them in age or condition. The *Golden Gate* was built in 1943 (R. 24), hence her statutory sales price under the Merchant Ship Sales Act of 1946 was fixed at $957,818.

On September 5, 1946, the United States sold the *Golden Gate* to the Chilean Line for the statutory price of $957,818 (R. 23-4). Although the collision damage was unrepaired, no reduction in the statutory price could have been made, and none was requested or allowed (R. 24). The price received was the same and only price at which the *Golden Gate could* and *would* have been sold had there never been a collision (Int. 11, R. 12, and answer thereto, R. 14).

On those facts, petitioner contended that the United States had sustained no actual damage or detriment other than the $250 spent for temporary repairs, since the *Golden Gate* was voluntarily sold as surplus at the full statutory fixed price, just as if there had been no collision damage. The government contended that it could recover for unrepaired damage (up to the limitation of liability ceiling) on the basis of the surveyors' estimates of what the repair cost would have been.

The courts below ruled in favor of the government and allowed $1,500, the limit of petitioner's liability, rather than the $250 which petitioner argued to be the only provable damage. As stated in the petition for certiorari, this is a novel issue on which there are no exact

precedents, and the government has many other claims pending which involve the same issue on similar facts, including several others against this petitioner.

SPECIFICATIONS OF ERROR.

We shall discuss the "questions presented", as set forth in the petition for writ of certiorari, in the same order as they are presented there, paraphrasing the issue so as to state our contention affirmatively as a subject heading for each part of the brief, as follows:

1. The United States sustained no actual detriment by reason of unrepaired collision damage to this C-2 merchant vessel, since no money was spent for repairs and the full statutory sales price was obtained—the same amount for which undamaged C-2 ships were sold, and the same amount for which this ship would have been sold even if there had never been a collision.

2. The basic rule of damages being to make the injured party whole, a mechanical rule of thumb for measuring damages should not be arbitrarily applied where the facts demonstrate its inapplicability and its inaccuracy in measuring actual detriment.

3. The quantum of recoverable damage is not fixed for all time at the moment a tort is committed; subsequent events may bear upon the amount of actual detriment and must be taken into consideration in fixing the damages.

ARGUMENT.

I.

THE UNITED STATES SUSTAINED NO ACTUAL DETRIMENT BY REASON OF UNREPAIRED COLLISION DAMAGE TO THIS C-2 MERCHANT VESSEL, SINCE NO MONEY WAS SPENT FOR REPAIRS AND THE FULL STATUTORY PRICE WAS OBTAINED—THE SAME AMOUNT FOR WHICH UNDAMAGED C-2 SHIPS WERE SOLD, AND THE SAME AMOUNT FOR WHICH THIS SHIP WOULD HAVE BEEN SOLD EVEN IF THERE HAD NEVER BEEN A COLLISION.

To the extent that temporary repairs were made and paid for ($250), petitioner's liability is clear, and is not contested. With respect to the unrepaired portion of the collision damage, however, and leaving aside for the moment any technical considerations, it is indeed difficult to see any actual damage or loss to the government.

No money was laid out for permanent repairs. The damage still existed in its original state when the *Golden Gate* was sold as surplus. Nor did the damage cause any reduction in selling price. The *Golden Gate* brought the exact amount specified by the statute for C-2 vessels of her age. Other C-2's, with no such existing damage, brought no more, and the *Golden Gate* would have brought no more even if she had not had this collision damage.

Essentially, the *Golden Gate* eventually sold for the full statutory price just as if petitioner's tug had never come within fifty miles of her. The collision damage had no bearing on the sales price, and did not deprive the treasury of a single dollar.

It is obvious that the United States sustained a loss on *all* these merchant vessels sold as war surplus. A sale at 50% of prewar cost or 35% of war cost, whichever

is higher, does not recoup the moneys expended to acquire such ships originally. The government did not want to continue operating merchant ships in peace-time, however, and wanted to make these modern vessels available to private operators. In order to do so, it was felt that a reduced price would have to be fixed, and Congress accordingly set prices at 50% of prewar costs, less depreciation, but not less than 35% of war cost.

The decision to sell C-2 vessels at a set price less than cost was the voluntary action of a sovereign state. It was not forced upon the shipowner by higher authority, nor was the decision so to sell the *Golden Gate* in any way motivated, caused or influenced by the collision damage or by any lessening of "value" thereby created. For good reasons, which had nothing to do with the collision, the United States voluntarily elected to sell a large number or surplus ships, and set a fixed price at which each ship was to be sold.

In a very real sense, this constituted a re-valuation of the ships on the government's books, and completely displaced "market value" as a relevant factor. From and after passage of the Act of Congress, a C-2 over one year old was worth exactly $957,818, no more and no less, to the government. In fact, as long as surplus C-2's were available at that price from the Maritime Commission, the statutory price *was* the market value, since no one would pay more in the market as long as he could get one from the government for that amount. When a C-2 sold for $957,818, it brought into the treasury all the money which Congress expected or intended to obtain.

The theoretical diminution in "market value" of the *Golden Gate* because of the collision with petitioner's tug thus became completely irrelevant to the basic question of the damage sustained by the government. From a realistic standpoint, and disregarding legal technicalities for the moment, the final outcome in dollars and cents of the government's ownership and operation of the *Golden Gate* was precisely the same as if there had never been a collision. Insofar as the unrepaired damage is concerned, the collision did not take one cent *out* of the public treasury, and did not reduce by one cent the amount which the *Golden Gate* finally brought *into* the treasury.

To invoke and apply a technical rule of thumb in order to grant a recovery to the United States is to allow a phantom damage over and beyond any actual loss or detriment. It must be a compelling rule of law which requires such a result, and we contend that no such rule exists.

The government's contention seems to be that the collision caused a diminution of the *Golden Gate's* market value which can be measured by the surveyors' estimates of what repairs would cost, and that the subsequent enactment of the surplus sales statute, and the sale of the ship thereunder, cannot deprive the government of its original cause of action. The District Court and the Court of Appeals accepted the contention of the United States, but for entirely different reasons, and we shall devote the remainder of this brief to a discussion of the legal reasons advanced by the lower courts to justify a closing of the eyes to the true situation.

Before doing so, let us emphasize a distinction which the Court of Appeals overlooked. We do not contend that subsequent events can or did wipe out a *cause of action.* We do contend that subsequent events can affect the *quantum of damage,* and that the actual detriment caused by the collision should be measured in the light of all the circumstances existing at time of trial.

II.

THE BASIC RULE OF DAMAGES BEING TO MAKE THE INJURED PARTY WHOLE, A MECHANICAL RULE OF THUMB FOR MEASURING DAMAGES SHOULD NOT BE ARBITRARILY APPLIED WHERE THE FACTS DEMONSTRATE ITS INAPPLICABILITY AND ITS INACCURACY IN MEASURING ACTUAL DETRIMENT.

In tort cases there are a number of rules or methods used in different situations to measure the quantum of actual damage. No one rule is necessarily *the* yardstick which must always be used in every case, however. The basic purpose of the law is to make the injured party whole, no more and no less, and in each case that particular yardstick or rule should be used which most fairly and accurately accomplishes that result. The purpose is not to punish the tort-feasor, nor to enrich the injured party, but to restore the latter to his prior situation so far as possible. *Restitutio in integrum* is the aim.

The rule in collision cases was early established in *The Baltimore,* 75 U.S. (8 Wall.) 377, 19 L. Ed. 463, where it is said that "restitutio in integrum is the leading maxim in such cases" and that

"Restitution or *compensation* is the rule in all cases where repairs are practicable, but if the vessel of the libelants is totally lost, the rule of damage is the market value of the vessel * * *"

8 Wall. (75 U.S.) at p. 386, 19 L. Ed. at p. 465.

"The general principle applicable where the collision is not wilful is that the owner of the injured vessel is to be recompensed to the amount of his actual loss; that is, he shall receive a remuneration *which places him in the situation he would have been in, but for the collision.*"

The Rhode Island, 20 F.C. #11,740a (S.D.N.Y.).

"The fact that a tort has been committed only calls into play the rule of *restitutio in integrum;* so that, where injured cargo nevertheless brought the full market value, the tort-feasor was not called upon to pay damages in respect thereof."

The Winfield S. Cahill, 258 Fed. 318 at 321 (2nd Cir.).

"The maxim restitutio in integrum expresses the principle governing the computation of damages adopted in collision cases in admiralty."

The Petar, 68 F. Supp. 296 at 298 (S.D.N.Y.).

That the yardstick generally used to measure damages in a certain kind of case must be discarded where, on the facts, it does not properly measure the actual detriment, but overestimates it, has been held by this Honorable Court in several situations. For example:

In *Ill. Cent. Ry. v. Crail,* 281 U.S. 57, 74 L. Ed. 699, 50 S. Ct. 180, a retail coal dealer bought a carload of coal

at wholesale, and it arrived with a shortage. He bought no replacement coal at retail and lost no sales, but simply bought other carloads at wholesale, from time to time, as needed. The lower court applied the general rule of market value at time and place of delivery, and allowed plaintiff the retail value of the lost coal as being value at destination.

The Supreme Court reversed and allowed only the wholesale cost to plaintiff, because that was all he lost, and that would make him whole. The opinion makes these points: that the basic aim is compensation for *actual* loss; that value at destination is generally used as the yardstick because it accurately and conveniently measures the actual loss; that this yardstick is not sacrosanct, but must be discarded when, on the facts of the case, it does *not* measure the actual loss as accurately as some other yardstick.

In *Brooklyn E. Dist. Terminal v. U .S.*, 287 U.S. 170, 77 L.Ed. 240, 53 S.Ct. 103, the issue was detention damage by reason of a tug's lay-up for repair of collision damage By working its other tugs overtime, the libelant took care of all its business without having to hire a substitute. The district court allowed the going rate for hire of a substitute tug, which was reversed on appeal. The Supreme Court opinion points out that there are several possible ways of measuring the owner's loss during lay-up for repairs, and hold that the court must consider the circumstances of the particular case and then choose the particular yardstick "most nicely adjusted to be a measure of reparation." As the Court said, "only

then can we know whether the interference with profit or enjoyment is to be ranked as substance or as shadow."

In collision cases where a vessel is partially damaged, several yardsticks have been used. If repairs are actually made, their reasonable cost is allowed, together with actual loss sustained by deprivation of use during the repair period. In some cases an allowance has been made for diminution in value, based on proof that market value was so much before collision, and that the damaged vessel was worth some lesser figure thereafter. In other cases, where repairs were not made, recovery has been allowed on the basis of experts' estimates of repair cost, on the theory that this represents the diminution in value, because a buyer would discount the price by the amount he would have to spend to put the vessel in sound condition.

In the instant case the first two yardsticks were inapplicable, since repairs had not been made and there was no testimony offered to show the depreciation in value caused by the collision. The lower courts, therefore, simply applied the third yardstick—i.e., allowance of the estimated repair cost—despite the particular circumstances which make that standard of measurement unfair and unreal.

The purpose should be to make restitution—to restore the government to as good a position as if there had never been a collision. In this case, if there had been no collision, the *Golden Gate* admittedly would have sold as surplus for the statutory price of $957,818, as other C-2 vessels were sold. Despite the unrepaired col-

lision damage, she still sold for *that same statutory price.* In short, the final outcome was that the *Golden Gate* brought into the federal treasury exactly the same number of dollars as she would have brought if petitioner's tug had never come near her.

Under those circumstances, the United States sustained no actual loss or detriment, and the adherence to the rule of estimated repair cost disregards substance for mere form, giving the government a windfall to which it is not justly entitled.

III.

THE QUANTUM OF RECOVERABLE DAMAGE IS NOT FIXED FOR ALL TIME AT THE MOMENT A TORT IS COMMITTED; SUBSEQUENT EVENTS MAY BEAR UPON THE AMOUNT OF ACTUAL DETRIMENT AND MUST BE TAKEN INTO CONSIDERATION IN FIXING THE DAMAGES.

The opinion of the Court of Appeals (R. 42) states that a wrongdoer in a collision is liable for damages to the vessel "as they exist at the moment of their creation," citing two Supreme Court cases, and refuses to give any weight to the war surplus statute and sale, because these events occurred after the collision. We respectfully submit that such is not the holding of the cited cases, and that it is well settled law to consider post-collision events which bear on the quantum of damage.

The Baltimore, 8 Wall. (75 U.S.) 377, 19 L.Ed. 463, cited by the Court of Appeals, was a collision case in which recovery on the basis of a total loss was allowed below and reversed in the Supreme Court because the

libelant had failed to prove that the vessel could not be raised and repaired for less than her value. It states the general rule for total loss to be market value at time of destruction. The same general rule is enunciated in *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146, 69 L.Ed. 890, 45 S.Ct. 465.

Neither of those cases holds that events after the collision can never be considered. All they hold is, that in case of *total* loss of the ship, her then market value is the measure of the owner's actual detriment. In that situation, where the ship is sunk and lost, no other rule would be reasonable. Both those decisions expressly recognize and state petitioner's contention—that the aim is to make the injured party whole. As the Court said in the *Southern Pacific* case:

> "Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby *to be put in as good position pecuniarily as if his property had not been destroyed.*"
>
> 268 U.S. at p. 155, 69 L.Ed. at p. 895, 45 S.Ct. at p. 469.

In a situation of total loss, obviously the value at time of loss measures the owner's damage, which is final and irrevocable then, and subsequent events will have no logical bearing on quantum of damages. The situation is otherwise in the case of partial damage to the ship. There, the owner's actual detriment can be determined more accurately by considering post-collision events which help to ascertain and measure the actual loss.

In this case, for example, suppose that the *Golden Gate* had actually been repaired three months after the collision, at a cost of $4,000. The government's damages would then be $4,000, rather than the $5,400 estimated by the surveyors immediately after the collision. An event taking place after the *tort* would thus diminish recovery by furnishing a more accurate yardstick to measure the actual detriment.

Just such a situation and holding will be found in *The City of Chester,* 34 Fed. 429 (S.D.N.Y.). Surveyors estimated the cost of repairing collision damage, and the shipowner later took the vessel to another port and obtained repairs at a cost less than the estimated figure. The court properly limited recovery to the actual cost, saying that "complete restitution is the extent of the damage recoverable."

Conversely, suppose that, three months after the collision, repairs were made and the cost proved to be $6,500. The United States would hardly concede that the $5,400 estimate of the surveyors was the limit of provable damages, but would contend, most properly, that the actual cost was the correct measure, even though based upon events occurring after the sale.

In *The Marie Palmer,* 173 Fed. 569 (E.D.Pa.), surveyors estimated that the collision had reduced the ship's market value by $5,000. When the vessel finally was sold, however, it brought only $3,900 less than sound value. On the basis of this sale well after collision, the damages were reduced to the amount demonstrated by that subsequent event.

In *The Pocohontas,* 109 F. (2d) 929 (2nd Cir.), a ship was damaged in collision and temporary repairs were made in the United States. She then sailed for England for drydocking and repair of underwater damage. On the voyage she sustained heavy weather damage which necessitated immediate drydocking and repair. While the heavy weather damage was being repaired, collision repairs were also made, and libelant claimed "demurrage" or detention damages for loss of use during the repair period, pointing out that the collision necessitated a lay-up for repairs, and that the subsequent storm damage added nothing to that pre-existing necessity.

The Court denied detention damages, because the storm *after* the collision necessitated drydocking and repair, so that *the loss of use would have been sustained even had there been no collision.*

The Court of Appeals' distinction of that case in its opinion below is that other events were the proximate cause of the detention rather than the collision. This, we humbly submit, is not entirely accurate, and does not meet petitioner's argument. In *The Pocohontas* the collision, as of the moment of its occurrence, fastened upon the shipowner the necessity of spending money and losing time in order to repair the damage. If damages are irrevocably and immutably fixed at the moment of the tort, the later storm damage should be irrelevant. Yet the case disallowed detention damage because subsequent events showed that such damage would have been sustained even had there been no collision, and *all that*

the shipowner was entitled to was to be put in the same financial position as if there had been no tort.

So, in the case at bar, the fact that the government received only $957,818 for the *Golden Gate* was not caused or brought about by her collision damage. The war surplus statute and regulations fixed that price for *all* C-2 vessels over one year old, and that same amount was received for sound C-2 vessels and for the *Golden Gate*. The subsequent events were highly relevant, and should not have been ignored.

In *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 81 L.Ed. 685 57 S.Ct. 452, the mother of a deceased seaman filed a wrongful death action against the shipowner under the Jones Act. Damages in such an action are measured by loss of future contributions and benefits for *the entire life expectancy of the survivor* (since she was older than decedent). Before the trial, however, the mother died, and her administrator revived the action. This Court held that her cause of action survived her death, by reason of the provisions of the Jones Act, but held that the only damages recoverable were for loss of support up to the moment of her death, citing to the same effect *Sider v. Gen. Electric Co.*, 238 N.Y. 64, 143 N.E. 792, and *Cooper v. Shore Elec. Co.*, 63 N.J.L. 558, 44 Atl. 633.

Those decisions again show that the quantum of recoverable damage is not always fixed for all time at the moment of the tort, but may be greatly reduced by events occurring thereafter which have no causal or other relationship to the tort. We see no reason why the subsequent events in this case must or should be disregarded

in fixing the amount needed to put the United States in as good a financial position as if there had been no collision.

In *The Super-X*, 15 F. Supp. 294 (S.D.N.Y.), a tank barge was damaged in collision and surveyors estimated costs at $850 for gas-freeing and $110 for repair work. There was no need for immediate repairs until leaks from other causes later developed, whereupon the barge was drydocked and gas-freed, and both collision and owner's repairs were made. The Commissioner allowed only the actual cost of working on the collision damage, and disallowed detention damage, towing to drydock, and the cost of gas-freeing.

This was upheld by Judge Patterson, who noted the libelant's reliance on the rule allowing recovery measured by estimates, and held that this rule is not inflexible, saying:

> "The libelant relies on the line of cases allowing as collision damage the estimated cost of repairs where no repairs are actually made or where only temporary repairs are made. The *Elmer A. Keeler*, 194 F. 339 (C.C.A.2); *Pennsylvania R. Co. v. Downer*, 11 F.(2d) 466 (C.C.A.2) It is claimed that if the collision damages had never been repaired, the libelant could have recovered the estimated cost of towing and gas freeing as well as estimated detention. But I take it that the rule of estimated cost of repairs in cases where no repairs are actually made is not an inflexible one. *Cf. Brooklyn Eastern Dist. Terminal v. United States*, 287 U.S. 170, 53 S.Ct. 103, 77 L. Ed. 240. What is allowed in cases of no repairs

> is the depreciation in value. In many instances the measure of depreciation is what it would have cost to make the repairs, on the theory that a prospective purchaser of the vessel would presumably calculate his price by deducting what he would have to spend in the future to repair the vessel. So we have the general rule relied on by the libelant as an analogy. In a case where the collision injuries were as light as here, however, the imaginary reasonable purchaser would not be presumed to subtract incidentals like estimated towage and gas freeing or estimated detention. He would count on working in the repair at some future time when the vessel was being repaired for other and more pressing damage or defect, thus avoiding double loss for the incidental items. The libelant's argument for the 'no repair' cases, while plausible, cannot be accepted."
>
> 15 F. Supp. at p. 296.

Petitioner concedes that if the case at bar had been filed and tried before passage of the War Surplus statute, the United States could properly have recovered for the estimated repair cost, and could have collected $1,500, the limit of petitioner's liability, rather than $250, actual cost of temporary repairs. The Court of Appeals' opinion remarks that if our contention is valid, petitioner would later have had a claim for refund of $1,250 when the *Golden Gate* sold for full statutory price. We respectfully submit that such a conclusion does not follow at all. The case would have become *res judicata,* and later events would not allow petitioner to reclaim what it had paid, any more than the death of the surviving beneficiary in a Jones Act case after judgment and payment thereof

would entitle the defendant to a refund of any excess in the *Cooper, Sider* and *Van Beeck* cases cited above.

The government argued in the District Court that the sale of the Golden Gate was "res inter alios acta" and fell within the rule that a tort-feasor cannot benefit by "reparation from a third party." The District Court relied on this contention in deciding for the government (R. 18, 103 F. Supp. 152, 1952 A.M.C. 483). We have always understood that the rule about reparation from a collateral source related solely to insurance and/or gifts from third persons to the injured man.

A sale of the damaged article is not "res inter alios acta", but is an act which fixes the amount of damage and is highly relevant. The very concept of "market value", which petitioner is supposed to have injured here, involves sales to third parties. Market value, after all, is the price at which the article, in this case the ship, can be sold to third parties.

That dealings with third parties are relevant on damages is demonstrated by the fact that the injured party must do what he can to mitigate the damages. If he can sell the damaged property and so reduce what would otherwise be a total loss, he must do so and credit the proceeds against the sound value. Such a method of computation is frequently used to measure the amount by which the tort has diminished the market value of the injured property.

In *The Marie Palmer,* 173 Fed. 569 (E.D. Pa.), a ship in collision was valued by appraisers as worth $8,000

before and $3,000 after the collision. This would indicate damage of $5,000. Eventually, however, the damaged ship sold for $4,1000, and the court properly credited *that* figure against sound value, to arrive at $3,900 as provable damages.

In *Hubbard v. U. S.*, 92 Ct. Cl. 381, the United States was successful in having a claim against it reduced by crediting the proceeds of sale of a wreck against the costs incurred in raising it.

In *The Dunbritton,* 73 Fed. 352 (2nd Cir.), cargo arrived with oil stains on the packages, and surveyors estimated an amount to be allowed as depreciation in value. At trial it developed that the cargo owner had eventually sold some kinds of cargo for full market price. The court denied recovery for the theoretical diminution in value because, by reason of his receipt of full sales proceeds, the libelant had sustained no actual loss.

We concede that those cases involved sales in a free market, unlike the sale at a fixed bargain price here concerned. The principle is the same, however, that a subsequent sale to a third person is *not* per se incompetent or irrelevant on the issue of damages, and does *not* constitute "reparation from a collateral source."

Also in point on this question is the case of *Agwilines, Inc. v. Eagle Oil & Shipping Co.,* 153 F. (2d) 869 (2nd Cir.), where a ship under charter was laid up for repair of collision damage. The charter party provided for half-hire during lay-ups, hence the owner collected only half the charter hire during this period, and lost half. His

detention damage was limited to the loss of half the hire. The shipowner contended that he should recover the full value of the lost use, because the half-hire he received from the charterer was reparation from a collateral source. This contention was properly rejected, since the actual loss was only that part of the hire which had not been received.

CONCLUSION.

To summarize our contentions:

The basic rule in allowing damages is to make the injured party whole and put him in the same financial position as if there had been no tort. There is no magic in any particular *method* of measuring damages. That method or yardstick should be adopted which, on the facts of a particular case, most accurately measures the actual detriment and makes restitution.

Events occurring after the tort may be relevant and material on the quantum of damages, and, where this is so, are not to be disregarded merely because they take place subsequent to the commission of the tort.

In this case the events taking place after the collision make it crystal clear that the United States sustained no actual loss. To adhere to the usual rule of damages is to disregard substance for form, and to allow reimbursement for a purely imaginary item of possible detriment which never came to pass.

That a writ of certiorari should be granted and the decision of the Court of Appeals reversed is

Respectfully submitted.

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Of Counsel.

Dated, San Francisco, California,
August 3, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 242

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Northern District of California (R. 18) is reported at 103 F. Supp. 152. The opinion of the Court of Appeals for the Ninth Circuit (R. 42) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1953 (R. 44). The petition for a writ of certiorari was filed on August 7, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the United States lost its right of recovery for collision damage caused by the admitted negligence of petitioner's tug when, pursuant to the subsequently enacted Merchant Ship Sales Act, the unrepaired Government vessel was sold as surplus some fourteen months after the collision to a third party at the "statutory sales price", which made no allowance for the unrepaired damage.

STATEMENT

This is an action to recover for collision damage to the Government owned SS *Golden Gate* arising out of the admitted negligence of petitioner's tug *Henry J. Biddle* (R. 22). The Government conceded that petitioner was entitled to limit its liability under 46 U.S.C. 183-189 to $1,500, the value of the tug (R. 23). As to the quantum of damages, the stipulated facts, which were adopted as the District Court's findings, are as follows:

The collision occurred on July 12, 1945 (R. 22). Immediately following the collision, the damage to the *Golden Gate* was surveyed by competent surveyors and the cost of permanent repairs was estimated to be $5,400—a fair and reasonable amount (R. 23). Temporary repairs were made at a cost of $250 (R. 23), but the permanent repairs were never made (R. 23).

On March 8, 1946, some eight months after the collision, Congress enacted the Merchant Ship Sales Act (60 Stat. 41, 50 U.S.C. App. 1735ff), which provided for the sale of surplus vessels at a "statutory sales price." (R. 23-24). The "statutory

sales price" was defined, with respect to vessels in the *Golden Gate's* class, C-2, as 50 per cent of "prewar domestic cost" less 5 per cent per annum for depreciation and 3 per cent per annum for war service, but not less than 35 per cent of "domestic war cost." Sec. 3(d), 50 U.S.C. App. 1736(d). Pursuant to the statutory definitions of "prewar domestic cost" and "domestic war cost," the Maritime Commission determined that 50 per cent of "prewar domestic cost" of C-2 vessels was $1,050,000, and that 35 per cent of "domestic war cost" was $957,818. 46 C.F.R. (1949 ed.) 299.56, p. 650.

The *Golden Gate* was built in 1943 (R. 24). Allowing for depreciation of 5 per cent per annum from $1,050,000 (50 per cent of "prewar domestic cost"), the "statutory sales price" of the *Golden Gate* necessarily became the minimum price of $957,818 (35 per cent of "domestic war cost"), regardless of her condition (R. 24).

On September 5, 1946, some fourteen months after the collision, the Government sold the *Golden Gate* to the Chilean Line for the "statutory sales price" of $957,818 (R. 23-24). Since the sum of $957,818 was the only price at which the *Golden Gate* could legally be sold (R. 17, 24), no reduction therefrom was requested by the buyer because of the unrepaired collision damage and no such reduction was made (R. 24).

On May 16, 1951, the instant libel was filed in the District Court for the Northern District of California (R. 3-6). After the parties had stipulated to the foregoing facts, the sole remaining issue was

whether the United States was entitled to recover the estimated cost of unrepaired damage. If the unrepaired damage was recoverable, the United States was entitled to a decree for $1,500, the limit of petitioner's liability under 46 U.S.C. 183-189; if not, the United States was entitled to a decree for $250, the cost of the temporary repairs actually made (R. 24).

On these facts, the District Court entered a decree in favor of the United States in the sum of $1,500 (R. 26). The court observed that (R. 19-20):

> Damages in collision cases, where the repairs are not made, can be measured either by estimated cost of repairs at a time immediately following the accident, as the [Government] seeks to do here, or by the diminution in the market value of the vessel. To avoid the influence of market fluctuations and price changes, either of these methods must be accomplished as soon after the collision as is reasonably possible.

Continuing, the court held that (R. 20):

> [Petitioner] cannot escape damages by showing that the vessel was sold eighteen months after the collision for a statutory sales price; he must go further and show that this sales price fairly reflected the market value of the vessel immediatley prior to the collision. The subsequent sales price eighteen months after the collision has no evidentiary significance in measuring the diminution in value of the vessel caused by the collision.

The Court of Appeals affirmed (R. 44). Rejecting petitioner's argument that the Government lost its right of recovery because it received the full statutory price for the *Golden Gate* in its unrepaired state, the court stated that "We find no merit in this contention. As well it could be made if the Steamship had been sold in an ordinary sale for a price exceeding her value to the extent of $5,650.00 [*i.e.* the cost of temporary and permanent repairs]." (R. 43).

ARGUMENT

1. Contrary to petitioner's assertion that this case presents an important new issue of law, the principles of law applicable to collision damage are well settled and are common ground between the parties. Petitioner does not deny that the accepted measure of collision damage, where repairs are practicable but have not been made, is the estimated diminution in market value caused by the collision or, in lieu thereof, the estimated cost of repairs necessary to restore the vessel to the condition in which she was at the time of the collision (Pet. 21). Petitioner's basic contention is that these "yardsticks" should not be applied arbitrarily, that events which are relevant and material on the quantum of damages may not be disregarded merely because they occur subsequent to the commission of a tort (Pet. 31). But we do not dispute this principle. The only question truly presented here is whether the particular events which occurred after the collision are relevant and material.[1]

[1] The thrust of the petition is directed to the proposition that

Admittedly, as petitioner points out, subsequent events may show that it would be improper to award damages based upon the estimated diminution in market value or the estimated cost of repairs. Thus, should repairs actually be made at a lower cost after estimates have been obtained, the measure of damages would be the cost of the repairs made. Similarly, should the vessel be sold within a reasonable time after the collision, the sales price would obviously more accurately reflect the market value after the collision than would an earlier estimate of that market value. In the particular circumstances of this case, however, we cannot agree with petitioner's contention that the sale of the vessel some fourteen months after the collision warrants disregard of the estimated cost of repairs as the proper measure of damages.

To begin with, assuming that the sale is material evidence of the market value of the vessel after the collision, it is nevertheless irrelevant to a proper application of the agreed standards of collision damage. Since no evidence was adduced with respect to the sound value of the vessel prior to the collision (Pet. 21), there is no basis in this record for computing the amount by which the collision diminished the market value of the vessel.

Moreover, even if there were evidence of the

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events occurring after a tort may bear materially on the quantum of damages. Although the petition creates the impression that the Government disputes this proposition, the Government did not argue below that subsequent events are *per se* irrelevant. Rather, it was urged that the particular events here had no evidentiary or other legal significance. See Br. for Appellee in the Court of Appeals, p. 20.

sound value of the vessel prior to the collision, the subsequent sale would have no bearing on post-collision market value. The Merchant Ship Sales Act fixed a "statutory sales price" (Sec. 3(d), 50 U.S.C. App. 1736(d)), based upon a percentage of cost, which did not purport to reflect market value. As petitioner notes, "the price for all C-2 vessels two years old or older was the floor price of $957,-818, *regardless of differences among them in age or condition*" [emphasis added] (Pet. 13). And as petitioner also states, "this constituted a re-valuation of the ships on the government's books, and completely displaced 'market value' as a relevant factor" (Pet. 16). For the stated purpose of fostering the merchant marine (60 Stat. 41), Congress chose to establish an arbitrary formula for calculating the sales prices of surplus Government vessels, a formula which took no account of the special factors bearing on the value of individual ships and thus departed from the normal criteria of "market value."

Admittedly, the Government suffered no out-of-pocket loss because the vessel could not have been sold by it for more than the statutory sales price even if she had not been damaged. It does not follow, however, that the Government suffered no compensable loss as a matter of law. In every case of collision damage, the owner of the injured vessel incurs no out-of-pocket loss until the vessel is repaired or is sold at a reduced price which reflects the damage. Nevertheless, it is undisputed that the owner of the injured vessel may recover for

the estimated diminution in market value or the estimated cost of repairs even though repairs are not yet made or the vessel has not been sold. Petitioner expressly concedes that if this action had been filed and tried before passage of Merchant Ship Sales Act, the Government "could properly have recovered for the estimated repair cost" (Pet. 28).

Similarly, where the injured party never actually incurs the expense of repairs or does not sell the vessel at a reduced price which reflects the damage, the ultimate out-of-pocket effect of the collision upon the injured party must be deemed legally irrelevant. A contrary conclusion would produce the absurd result of precluding recovery in those cases where, without repairs having been made, the vessel is ultimately lost at sea through an unrelated cause or is ultimately sold for scrap because of obsolesence prior to suit. Further, a contrary conclusion would conflict with the rule, which petitioner accepts (Pet. 29), that an injured party is not barred from recovery merely because he receives reparation from a collateral source, such as insurance, and thereby sustains no out-of-pocket loss. While we do not contend that the sale technically constituted reparation from a collateral source, we submit that, in the circumstances of this case, the sale was equally *res inter alios acta* and therefore irrelevant to the damage for which petitioner should be held liable. See R. 20-21.

2. Although petitioner alleges that a large number of similar claims for unrepaired damage to

Government vessels is now pending, our files do not indicate that the number of these claims is substantial.[2] To the extent that these claims involve collision damage which affects the class of the vessel, the instant question was mooted by the amendment to Section 3(d) of the Merchant Ship Sales Act (50 U.S.C. App. 1736(d)) contained in the Independent Offices Appropriation Acts of July 30, 1947 (61 Stat. 585, 603) and June 30, 1948 (62 Stat. 1196, 1199). This amendment authorized the Maritime Commission to "make allowances to purchasers of vessels for cost of putting such vessels in class, such allowances to be determined on the basis of competitive bids, without regard to the provisions of the last paragraph of section 3 (d) of the Merchant Ship Sales Act of 1946."[3] Moreover, the Merchant Ship Sales Act itself expired on January 15, 1951 (Act of June 30, 1950, 64 Stat. 308; Act of August 17, 1950, 64 Stat. 452). In this light, and since the question is not one which affects the day-to-day operations of the maritime industry generally, further review is not warranted.

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[2] Insofar as petitioner is concerned, examination of the files of the Maritime Administration reveals that the claims pending against petitioner and its affiliated companies, which raise the instant question, add up to a total of approximately $2,750. The claims of this nature against petitioner itself amount only to approximately $1,600, *viz.*, MV *Blackwell Hitch*—$850; SS *Capa Alava*—$411; SS *Hook Hitch*—$52; SS *Whirlwind*—$300. The claims of this nature against petitioner's affiliated companies involve the SS *Philip Doddridge*—$135, and the SS *Ventura Hills*—$1,000.

[3] As noted above, pp. 2-3, Section 3(d) of the Merchant Ship Sales Act, as enacted in 1946, set a minimum "statutory sales price" of 35 per cent of "domestic war cost" and made no provision for allowances for unrepaired damage.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1953.

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